1989

Robert G. Garland v. Floyd J. Rigby : Petition for Writ of Certiorari

Utah Supreme Court

Patrick H. Fenton; Attorney for Appellant.
Michael W. Park; Attorney for Respondents.

IN THE SUPREME COURT

OF THE STATE OF UTAH

ROBERT G. GARLAND and MARY GARLAND, Plaintiffs-Respondents, vs. FLOYD J. RIGBY, RAY HALL, RIMARAS, INC., a Utah Corporation, and ANNA R. FLEISCHMANN, Defendants-Appellant.	Certiorari Docket No.: 890515 Utah Ct. of Appeals No.: 88-0707-CA

PETITION FOR WRIT OF CERTIORARI

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All parties are listed above that were in anyway involved in the proceeding. The Plaintiffs and the Defendant Fleischmann are the only parties that appeared in either the trial court or the proceedings before the Court of Appeals.

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IN THE SUPREME COURT

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PARTIES TO THE PROCEEDING

All parties are listed above that were in anyway involved in the proceeding. The Plaintiffs and the Defendant Fleischmann are the only parties that appeared in either the trial court or the proceedings before the Court of Appeals.

QUESTIONS PRESENTED FOR REVIEW

A. Whether or not the Courts interpret Title 78-12-12, Utah Code Annotated, (1953, as amended) in accordance with the wording of the statute or some other way.

B. Is an agreement for other land signed by individuals from outside the chain of title coupled with possession only of the captioned land and without paying taxes for seven years sufficient for adverse possession.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS ISSUED BY THE COURT OF APPEALS

A. The case that probably brought this decision out of the Sixth District Court, with the Honorable Don V. Tibbs,

presiding, is the case of Lach v. Deseret Bank, (see Court of Appeals case, dated December 7, 1987, on which a rehearing was denied January 14, 1988. In the Lach case, the Court of Appeals reversed Judge Tibbs on the same questions. There was an Earnest Money Agreement made prior to the docketing of the judgment lien. Judge Tibbs granted summary judgment for the creditor based upon the judicial sale, and the Court of Appeals set aside the motion for summary judgment. The reversal was with a holding that from the date that the judgment lien was filed, the property had already been sold by virtue of a forceable transfer of rights to a creditor for value. Stating that there was an enforceable right of purchase by virtue of equitable conversion, it stated at the moment that the enforceable executory contract of sale was created and the purchaser, thereafter, is treated as owner of the land. That a judgment lien created thereafter would not prevail. In the Lach case, Judge Tibbs decided in favor of the judgment lien on the basis that title was still in the person of record as of the filing of the judgment lien. This was reversed by the Court of Appeals with the filing date of December 7, 1987. A rehearing on the matter was denied January 14, 1988.

B. In the instant case of Garland v. Rigby, et al., after refusing both Plaintiffs' and Defendant Fleischmann's motions for summary judgment, the matter came before Judge Tibbs on the 6th day of October, 1988, approximately one year or less after the reversal in the Lach case. Judge Tibbs followed the Lach case but went one further. He made the same ruling to an existing sale contract which described different land, on

testimony that the parties who then owned no interest in the property being the subject matter of the action, agreed that that would be the property covered by the conditional sale contract. There was never an amendment to the conditional sale contract. The Defendant Fleischmann could not deny the statement that an agreement was made by someone outside of the chain of title. The Findings of Fact and Conclusions of Law of the Garland v. Rigby, et al. case are the subject matter of this action and are set forth in the Addendum hereto as is the Memorandum Decision of the Court of Appeals and their Order Denying the Petition for Rehearing.

Reference is made to the decision of the Court of Appeals on a two-to-one basis of the panel that heard the item. It was the decision of the Court of Appeals that the matter was not to be published. However, as a decision, it comes under this classification of, it is either an official report or it is an unofficial report of an opinion issued by the Court of Appeals.

C. The Court of Appeals of Utah in the case of Frandsen v. Holladay, 739 P.2d 1111, decided the other way in a contested matter in which they endorsed the judgment lien as against the deed. The basis is that the purchase was subsequent. This is not the same situation as when the deed was executed after the judgment lien was filed. At that time, it was deeded back to the judgment debtor.

D. Averett v. Utah County Drainage District No.1,

763 P.2d 428; the situation in this case does not take care of the lien question but does take care of the adverse use. It was a situation of a drainage ditch and other property that had been deeded for drainage ditch purposes many years before. The present land owner of adjacent land claimed adverse possession. It was held that public use of the ditch pertained to the land adjacent to it that had been deeded for this purpose and took it out of the adverse possession question. The implication of this decision by the Court of Appeals on the 26th day of October, 1988, is to the effect that the adverse possession statute must be strictly complied with. At the sametime, the panel of the Court of Appeals was holding in the instant case, that it does not have to be complied with.

E. In Marchant v. Park City and the State of Utah, 771 P.2d 677, it was decided by the Court of Appeals of Utah on March 13, 1989, that the statute of adverse possession had to be strictly complied with which is identical with the case at bar, except for the decision. Certiorari was granted on this item by the Supreme Court of Utah on September 5, 1989.

STATEMENT OF GROUNDS

Jurisdiction of the Supreme Court is as follows:

A. The decision of the panel from the Court of Appeals is the 1st day of September, 1989; the same was filed on that date.

B. The Order Denying the Petition for Rehearing was dated the 11th day of October, 1989, and was filed on that date.

C. Not applicable.

D. There is a question of statutory interpretation and conflicting opinions out of the Court of Appeals. This falls under the provisions of Rule 43 (1), (2) and (3).

This is a matter that was originally tried before the District Court of the Sixth Judicial District for Garfield County, Utah, and was in the area where the Supreme Court of Utah had appellate jurisdiction. The Notice of Appeal was originally filed with the Supreme Court of the State of Utah, pursuant to statute. The case was then assigned to the Utah Court of Appeals by the Supreme Court of Utah pursuant to Utah Code Annotated, Section 78-2A-3 (2)(j). The processes of the Court of Appeals have been exhausted.

CONTROLLING PROVISIONS OF STATUTES

At this time the Supreme Court of Utah has jurisdiction under the provisions of Title 78-2-2 (a) and the following statutes.

A. Title 78-12-7, Utah Code Annotated, (1953, as amended.)

B. Title 78-12-12, Utah Code Annotated, (1953, as amended.)

The statutes are cited in the Addendum and are included verbatim therein.

STATEMENT OF THE CASE

It appears that there are two realms of time that should be initially set forth independent of each other. One

is the time element of the Plaintiffs Garland and the other is the time element of the Defendant Anna R. Fleischmann.

In setting up the time elements of the Plaintiffs Garland, one must first go to page 4 of the transcript. The parties that actually took part in the trial were Garland and Anna R. Fleischmann. Although Floyd J. Rigby had filed an answer, he did not receive trial notice. Ray Hall had an attorney present although there was no evidence that a pleading had been filed and that there were motions for dismissal pertaining to the cause of action that was dismissed after the trial. Rimaras, Inc. was not represented. The whole trial was based upon the adverse possession of Robert G. Garland and Mary Garland. It was so stated by counsel on page 4 of the transcript, at line 14, "I'm asking the Court to quiet title to this pice of property against all of the Defendant." In the next line or so, counsel indicates that all are in default except for Miss Fleischmann and Ray Hall. A statement was made by Hall's attorney that Hall claimed no interest in the property continuing with the transcript, page 4, from line 17 to page 5, line 3. It must be remembered that there are two lots that are discussed in this transcript. Apparently, the Court of Appeals did not ascertain this information. Lot #126 in the area described is the item set forth on the Earnest Money Receipt and Offer to Purchase. The people who signed as sellers never owned this property. Lot #128, two lots away, is the subject matter of this action. The following recites the elements pertaining to these lots from Plaintiff's testimony. Garlands' first interest in the

property appears to be the Purchase Agreement of Lot #126 with individuals known as Rigby and Hall. The Purchase Money Agreement in evidence is on Lot #126, exhibit #1. which is included in the Addendum hereto. Although Garlands claimed it to be Lot #128, it was Lot #126. The Purchase Agreement was dated the 31st day of October, 1980. (See transcript page 10, lines 1 to 17.) There was an attempt to change it to Lot #128, which was objected to under the statute of fraud. (See transcript page 11, line 6.) There appears to be several conversations between Hall and Rigby and the Plaintiff concerning changing of lots. There was never a document achieved until after the involvement of Miss Fleischmann. The document actually achieved was never delivered until after the trial. The agreement may have been enforceable as to Lot #126; it has never been enforceable as to Lot #128. Floyd J. Rigby and Ray Hall never owned the property. Garlands became aware of this when they tried to pay taxes in 1986. At that time, they thought they were dealing personally with Rigby and Hall. (See transcript page 15, lines 1 to 6.)

Mr. Garland did not pay taxes on the property until 1986 at which time he paid taxes for 1981, 1982, 1983, 1984, and 1985. (See transcript, page 16, line 13, and exhibit 13.) The date of payment was January 31, 1986. (See transcript, page 16, line 30. Also see transcript page 17, lines 17 to 19 inclusive. Also see transcript page 18, lines 8 to 10 inclusive.) During this period, he took possession of the property and built on the property in the early 1980s. He paid the 1987 taxes. (See transcript page 28, line 9; page 29, line 3, and exhibit 5.)

Payment of the 1987 taxes were paid in November, 1987. Payment of these taxes and the testimony of Mrs. Henrie, the Garfield County Treasurer is quite material. (See transcript page 39, lines 4 to 13.) On page 40 of the transcript, line 1 shows that the five years--1982 through 1985 inclusive--taxes were paid by Mr. Garland in 1986. The rest of page 40 of the transcript shows that Mr. Garland paid the 1987 taxes. Exhibit 8 on page 41 of the transcript identifies a lady in Nevada, Miss Fleischmann, as the person who paid the 1986 taxes prior to the trial. At the time of the trial, they were paid.

The other essential time element is the title of Lot #128. This was established by a title person by the name of Thomas B. Hatch, (see transcript pages 33 to 39.) On page 33, at line 22 of the transcript, Lot #128 was identified as exhibits 10 and 11. Exhibit 10 was an abstract; exhibit 11 was a copy of a deed. Mr. Rigby and Mr. Hall never owned any interest in the property during the time of the abstract. (See transcript, page 35, lines 18 to 26.) At such time, the Court asked Mr. Hatch to run through the abstract. (See transcript, page 35, line 23.) The abstract checked back to 1940, when a Mrs. Jensen owned the property. The property was then deeded to a Mr. and Mrs. Allen. When Mr. Allen died, a tax waiver from the Utah State Tax Commission and an affidavit of survivorship were filed. (See transcript page 37, lines 1 to 8.) Mrs. Warwick, the remarried Mrs. Allen, deeded the property to Rimaras, Inc. on the 14th of July, 1981. There was never any transfer of title whatsoever until the time of trial. (See transcript, page 37, lines 22 to 25.) There was no

transfer of title until the Fleischmann judgment. (See transcript page 38, lines 14 and 15.) From this, it can be seen that the effective date of the filing of the Fleischmann judgment in Garfield County was the 8th day of July, 1985, at which time the property was in the name of Rimaras, Inc. Rimaras is not a party to any agreement and no one in chain of title dealt with the Plaintiffs. The written agreement of Hall and Rigby was on Lot #126. There was nothing but verbal agreements between Hall and Rigby pertaining to Lot #128 and Rimaras was not a party to the same. The redemption time expired, and the Sheriff's deed was recorded after the suit was started but was recorded before trial. The question is, what was the interest of Rimaras, Inc. in Lot #128 on July 8, 1985. This was the date of the judgment lien recording to Anna R. Fleischmann. The Sheriff's deed was delivered and recorded after the suit was started. The abstract was entered as exhibit 10 and was identified by Mr. Hatch. (See transcript, page 34, lines 14 to 15. The same is dated July, 1988.) There is no reference to Hall or Rigby in the title whatsoever. Mr. Hatch in his testimony made the statement on page 36, "A deed that was recorded July 14th, 1981, to a Rimaras, Inc., who I am told is Mr. Hall and Mr. Rigby. I have no actual knowledge that that is a true statement." There is no evidence whatsoever outside of this atatement of any involvement of Mr. Hall or Mr. Rigby in Rimaras, Inc. There is a finding by the Court, that exhibit 2, together with exhibit 4 that shows the interest of Rimaras, Inc. was never delivered to the purchaser Garland. (See transcript, page 62, line 3.) Garland at that time was on notice that this property belonged to Rimaras, Inc. and did nothing about it.

There was a Sheriff's sale on the 11th day of January, 1988, to Miss Anna R. Fleischmann.

ARGUMENTS

A. WHETHER OR NOT THE COURTS INTERPRET TITLE 78-12-12, UTAH CODE ANNOTATED (1953, as amended) IN ACCORDANCE WITH THE WORDING OF TEH STATUTE OR SOME OTHER WAY

There should be very little argument about this. The Supreme Court of Utah, and to some degree, the Court of Appeals have followed this doctrine without limitation to the effect that adverse possession has to strictly comply with this statute, Title 78-12-12, Utah Code Annotated, (1953, as amended.) Prior to the case of Home Owner's Loan Corp. v. Dudley, 105 Utah 208, 141 P.2d 160, which was decided in 1943, to the effect that adverse possession can only be acquired in accordance with the exact provisions of the statute requiring adverse possession to be for a continuous period of time during which a claimant is in possession, has paid all taxes levied and levied on that particular property and there must be indicia of title. At that time rather than Title 78-12-12, Utah Code Annotated, (1953, as amended), the Court used Title 104-2-12, Utah Code Annotated, (1943, as amended.) There is a considerable amount of discussion of adverse possession, how it is interpreted and how it is acquired. And that the statute must be strictly complied with, with taxes being paid and there must be indicia of title. This was a reversal of the trial court by the Supreme Court of the State of Utah. In all probability, it is a leading case in this particular area. This doctrine has been upheld by the Supreme Court of the State of Utah many times. In the case of Royal Street Land Company

v. Reed, 739 P.2d 1104, decided on the 9th day of July, 1987, the doctrine was upheld by the Supreme Court of the State of Utah. Where there is a long time history, one cannot help but wonder what was intended by the authors of the Memorandum Decision in the instant case, Garland v. Rigby, et al. and the divided decision of the Court of Appeals of Utah on the 1st day of September, 1989, where it was rendered with the statement under the words, "Memorandum Decision, '(Not for Publication)'. Also, one must look to the dissenting opinion of the Honorable Russell W. Bench, Court of Appeals Judge, where in his opinion, he upheld the judgment lien of Miss Fleischmann.

However, since this Memorandum Decision of the Court of Appeals in this Garland v. Rigby, et al. situation, filed the 1st day of September, 1989, and the Order Denying Petition for Rehearing, dated and filed the 11th day of October, 1989, the Supreme Court of Utah has upheld the doctrine that the statute of 78-12-12, Utah Code Annotated (1953, as amended,) must be strictly upheld. In the case of Grayson Roper Limited Partnership, et al. v. Finlinson, et al., 119 Utah Advance Reports, decided by the Honorable George E. Ballif in Millard County, Utah, and appealed to the Supreme Court of Utah, and on which the Supreme Court of Utah has taken jurisdiction instead of remanding it back to the Utah Court of Appeals, as they did the Garland case, and in the opinion on the Grayson Roper Limited Partnership, et al. v. Finlinson, et al., filed on the 17th day of October, 1989, it was stated that there must be strict compliance in relation to Title 78-12-12, and it was upheld. It was an unanimous decision

of the Supreme Court of Utah, with a Court of Appeals Judge sitting in as a substitute for Associate Justice Howe. There is a stunning declaration of statutory construction very correctly done. On page 30 of 119 Utah Advance Reports, there is this statement found in the second column, line nineteen, in relation to statutory construction as follows:

> land is deemed to have been possessed and occupied by a party seeking to establish adverse possession. They specify that cultivation of crops suffices for possession or occupation. But that alone is not enough to establish a claim of adverse possession. Payment of taxes is also required. Section 78-12-12 provides:
>
> > 'In no case shall adverse possession be considered established under the provisions of any section of this code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predessors and grantors have paid all taxes which have been levied and assessed upon such land according to law.'

Thereafter, there is considerable discussion of what payment of taxes means.

B. IS AN AGREEMENT FOR OTHER LAND SIGNED BY INDIVIDUALS FROM OUTSIDE THE CHAIN OF TITLE COUPLED WITH POSSESSION ONLY OF CAPTIONED LAND AND WITHOUT PAYING TAXES FOR SEVEN YEARS SUFFICIENT FOR ADVERSE POSSESSION.

This gets to the point where anyone who wants a piece of that is coming up for a judgment sale, if he is in the position where the purchaser cannot deny his verbal statement that he agreed with a deceased owner or a prior owner where there is no contract, saying, "I bought that piece of property when a

stranger appears at the judgment sale. In the event the Supreme Court of Utah sees fit in this Garland v. Rigby, et al. case to follow the trial court and the Court of Appeals, this puts in jeopardy every title insurance item in the State of Utah that is based upon a judgment sale. All a person has to do to take the property is to show up and say, "I had a possible deal on this property with John who is now not available and not in the chain of title, and I want the property." Enforcement of this Court of Appeals decision will be in the opinion of the undersigned jeopardize a great deal of title insurance in the State of Utah. The Supreme Court of the State of Utah has in many, many cases, culminating in the case of Grayson Roper Limited Partnership v. Finlinson, et al., decided on the 17th day of October, 1989, and found at 119 Utah Advance Reports, 29, quickly turned its back on this thought. The failure of Garland to pay the 1986 taxes entirely does away with everything else that he has done. The fact that they were paid by Fleischmann's representative after the suit was commenced for adverse possession does not remedy this situation.

In the Grayson Roper Limited Partnership v. Finlinson case, cited above, in October, 1989, the Supreme Court of Utah defines the intent of Title 78-12-12, and the requirement that the intent be complied with. In addition, to the cases of Home Owner's Corp. v. Dudley, quoted above and Royal Street Land Company v. Reed, quoted above, decided in 1943 and 1987, it reiterates the doctrine of strict complaince with that statute. It cites Farrer v. Johnson, 2 Utah 2d 189, pages 193 and 194, decided June 10, 1954, which is an endorsement of the doctrine,

and it cites other cases even ahead of the landmark case of Home Owner's Corp. v. Dudley, cited above. There are many other cases prior to Grayson Roper Limited Partnership v. Finlinson, et al. in which the Supreme Court has been consistent in finding the meaning of the statute and requiring compliance with the statute. The same doctrine should be applied to the case at bar, Garland v. Rigby, et al.

DATED this 21 day of November, 1989.

Respectfully submitted,

PATRICK H. FENTON
Attorney for Defendant-Appellant
Anna R. Fleischmann

FILED

OCT 11 1989

Mary T Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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Robert G. Garland and Mary Garland, Plaintiffs and Respondents, v. Floyd J. Rigby, Ray Hall, Rimaras, Inc., a Utah corporation, and Anna R. Fleischmann, Defendants and Appellant.	ORDER DENYING PETITION FOR REHEARING Case No. 880707-CA

THIS MATTER having come before the Court upon Respondent's Petition for Rehearing,

IT IS HEREBY ORDERED that the Petition for Rehearing is denied.

DATED this 11th day of October, 1989.

FOR THE COURT:

Mary T. Noonan
Clerk of the Court

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of October, 1989, a true and correct copy of the foregoing ORDER DENYING PETITION FOR REHEARING was deposited in the United States mail.

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DATED this 11th day of October, 1989.

By _____
Deputy Clerk

IN THE UTAH COURT OF APPEALS

FILED

SEP 1 1989

Mary T. [illegible]
Clerk of the Court
Utah Court of Appeals

----ooOoo----

Robert G. Garland and Mary Garland,	
Plaintiffs and Respondents,	MEMORANDUM DECISION (Not For Publication)
v.	
Floyd J. Rigby, Ray Hall, Rimaras, Inc., a Utah corporation, and Anna R. Fleischmann,	Case No. 880707-CA
Defendants and Appellant.	

Sixth District, Garfield County
The Honorable Don V. Tibbs

Attorneys: Patrick H. Fenton, Cedar City, for Appellant
Michael W. Park, Cedar City, for Respondents

Before Judges Bench, Billings, and Orme.

BILLINGS, Judge:

Appellant Anna R. Fleischmann appeals from the trial court's order quieting title to a parcel of property referred to as lot 128 in respondents, Robert and Mary Garland. We affirm.

Fleischmann does not challenge the trial court's findings of fact. Therefore, we review the court's decision under a correction-of-error standard according no deference to its legal conclusions. See, e.g., Taubert v. Roberts, 747 P.2d 1046, 1048 (Utah 1987). Nonetheless,

> [s]ince this is an action at law, upon review, the findings and judgment of the trial court will be presumed valid, and the record will be reviewed in a light favorable to them. The appellant is required to sustain the burden of proving error, and the

> judgment of the trial court will not be disturbed if there be substantial evidence in the record to support it.

Ash v. State, 572 P.2d 1374, 1376 (Utah 1977) (footnote omitted) (emphasis added).

Giving Fleischmann the benefit of the doubt, she claims the trial court erred in concluding, 1) the Garlands took the property by adverse possession, 2) Rimaras, Inc. had no legal interest in lot 128 in July 1985 when Fleischmann filed her judgment lien, and 3) Fleischmann did not acquire lot 128 as a result of the sheriff's sale.

We first address Fleischmann's adverse possession claim. We agree the trial court's order cannot be sustained under a theory of adverse possession. However, adverse possession was neither raised, argued, nor relied upon as the basis for the trial court's order. Following counsels' closing arguments, the trial court asked the Garlands' counsel, "how do you even get your basis for your title? You haven't even got it under adverse possession." Furthermore, the Garlands at no time suggested that they owned the property by virtue of adverse possession. Rather, the Garlands relied on, among other theories, the doctrine of oral agreement and full performance.

Fleischmann's second and somewhat confusing claim is that no legal conveyance occurred between Rimaras, Inc. and the Garlands because a conveyance of title to the Garlands was not recorded prior to the date her judgment lien attached to the property. However, Utah law is clear--recordation is not a prerequisite to a valid conveyance of real estate as between the parties to the transaction. See Utah Code Ann. § 57-1-6 (1986) (repealed by 1988 Utah Laws ch. 155, § 24); Gregerson v. Jensen, 669 P.2d 396, 398 (Utah 1983). "[A] conveyance of real property is valid and binding between parties, even without recordation." Bekins Bar V Ranch v. Beryl Baptist Church, 642 P.2d 371, 373 (Utah 1982). See also Huntington City v. Peterson, 30 Utah 2d 408, 518 P.2d 1246, 1247-48 (1974) (title passed at date deed was delivered, notwithstanding no recordation).

Moreover, Fleischmann is not entitled to the statutory protections accorded subsequent purchasers under Utah Code Ann. § 57-3-3 (1989). It is clear that she had actual notice of the Garlands' purported interest in lot 128 prior to the sheriff's sale, thereby precluding Fleischmann from being a "good faith" purchaser under the statute. Accordingly, the resolution of

this dispute is not controlled by the recording statutes. Cf. Gregerson, 669 P.2d at 398.

Utah law is also clear that a judgment lien attaches to the nonexempt real property of the debtor, but is "'subordinate and inferior to a deed which predate[s] it, whether recorded after such judgment or whether not recorded at all.'" Lach v. Deseret Bank, 746 P.2d 802, 804 (Utah Ct. App. 1987) (quoting Kartchner v. State Tax Comm'n, 4 Utah 2d 382, 294 P.2d 790, 791 (1956)). We find no relevant distinction between property conveyed by deed or property conveyed by other legally valid methods. The foregoing rule of law applies with equal force to any effective conveyance of real property occurring before the date the judgment lien attaches.

> "[I]f the unrecorded conveyance was one which was made in good faith and for value, the lien would not attach, even though the judgment creditor had no knowledge or notice of it. By merely docketing his judgment, a judgment creditor parts with nothing, and does not become entitled to have the property of an innocent purchaser for value applied in satisfaction of a debt he does not owe."

Wilson v. Willamette Indus., Inc., 280 Or. 45, 569 P.2d 609, 611 (1977) (quoting Thompson v. Hendricks, 118 Or. 39, 245 P. 724, 726-27 (1926)).

Although the trial court's legal basis for quieting title in the Garlands rested on a theory of equity and fairness, which, without more, cannot be sustained, in the interest of judicial economy, this court "may affirm trial court decisions on any proper ground(s), despite the trial court's having assigned another reason for its ruling." Buehner Block Co. v. UWC Assocs., 752 P.2d 892, 895 (Utah 1988). See also Mel Trimble Real Estate v. Monte Vista Ranch, Inc., 758 P.2d 451, 456 (Utah Ct. App. 1988).

Accordingly, in light of the foregoing, the narrow issue presented on appeal is whether the record supports a finding that Rimaras, Inc. had no ownership interest in lot 128 on or after the date Fleischmann's lien was docketed.

At trial, the Garlands quiet title action rested in large part on a theory of oral agreement and part or full performance. Cf. Baldwin v. Vantage Corp., 676 P.2d 413, 417 (Utah 1984); Legrand Johnson Corp. v. Peterson, 26 Utah 2d 158,

486 P.2d 1040, 1041 (1971). After reviewing the record, including Mr. Garland's undisputed testimony, the pleadings, in which admissions of fact contained therein are treated as conclusive against the party making them, see Baldwin, 676 P.2d at 415, and Rimaras, Inc.'s post-trial stipulation, we conclude the evidence supports the Garlands' legal theory.

Mr. Garland testified that the parties entered into an oral agreement to purchase lot 128. In reliance, Mr. Garland took possession and constructed a cabin on the property. In consideration for the property, Mr. Garland gave personal property to Hall and Rigby. Mr. Garland's undisputed affidavit stated that he paid the purchase price in full pursuant to the parties' agreement.

In his answer to the Garlands' complaint, Floyd Rigby did not deny that the Garlands entered into an agreement with Rimaras, Inc. to purchase lot 128, and thus his failure to respond is deemed an admission. Ray Hall, in his answer, affirmatively asserted that he acted on behalf of Rimaras, Inc. during all relevant times to this action. Finally, Rimaras, Inc.'s post-trial stipulation disclaimed any interest in the property as of 1982, and affirmatively asserted that the Garlands were the owners of the property and entitled to possession as of that same year. Moreover, we treat the stipulation as binding between the parties in the absence of a legitimate challenge to the validity of the agreement. See generally Day v. Steele, 111 Utah 481, 184 P.2d 216, 220 (1947). Although Fleischmann did challenge the stipulation generally, in the proceedings below, the trial court did not rule on the challenge nor does Fleischmann renew her challenges before this court.

Accordingly, we find the evidence supports the Garlands' theory of oral contract and full performance, and thus, the trial court's conclusion that Rimaras, Inc. had no interest in the property either at the time the lien was docketed or at the time of the sheriff's sale. The order quieting title to lot 128 in the Garlands is affirmed.

Judith M. Billings, Judge

I CONCUR:

Gregory K. Orme, Judge

BENCH, Judge (dissenting):

I respectfully dissent.

The majority's affirmance of the trial court's order seems to be based on the fact that Rimaras had no legal interest in lot 128 when Fleischmann filed her judgment lien. Record title clearly shows that Rimaras owned the property on that date. Any claim that the Garlands may have had to the disputed property derives from actions and promises by Hall and Rigby--not Rimaras. There is not even a claim that Hall and Rigby ever owned the property or that Rimaras is the alter ego of Hall and Rigby. My colleagues' decision suggests that a disclaimer of interest by record owner Rimaras can alter title to the disadvantage of judgment creditor Fleischmann. I believe that is contrary to law.

I would reverse the "equitable" judgment of the trial court.

Russell W. Bench

Russell W. Bench, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 1st day of September, 1989, a true and correct copy of the foregoing Memoran Decision was mailed to each of the following:

Patrick H. Fenton
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Hon. Don V. Tibbs.
Sixth District Court
Garfield County
#3261

Julia C. Whitfield
Deputy Clerk

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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR

GARFIELD COUNTY, STATE OF UTAH

ROBERT G. GARLAND and MARY GARLAND, Plaintiffs, vs. FLOYD J. RIGBY, RAY HALL, RIMARAS, INC., a Utah Corporation, and ANNA R. FLEISCHMANN, Defendants.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 86-431

The above entitled matter came on regularly for hearing on Thursday the 6th day of October, 1988, before the Honorable Don V. Tibbs, District Court Judge and the Plaintiffs were present and represented by their attorney, Michael W. Park and Anna R. Fleischmann was represented by her attorney, Patrick H. Fenton and the Court having heard the testimony of the parties and having reviewed the exhibits and having heard the arguments of counsel, now makes its findings of fact and conclusions of law.

1. The Court finds that the Plaintiff purchased property from Floyd Rigby and Ray Hall in the area of Mammoth Creek Estates, pursuant to a certain earnest money receipt and offer to purchase. The Court finds that the Plaintiffs were given the option to take a different lot in the Tommy Creek Subdivision and

Plaintiffs examined the premises and exercised their option to purchase lot #128.

2. The Court finds that the Plaintiffs went into possession of lot #128 at Tommy Creek Subdivision in 1981 and purchased a cabin kit from Floyd Rigby or Ray Hall and put a cabin on lot #128.

3. The Court finds that the Plaintiffs were in physical possession of said cabin on a regular basis until 1986 when Plaintiff became ill and could not go to the high altitudes because of said illness.

4. The Court finds that the Plaintiffs received a letter from Ray Hall on January 21, 1981, together with a copy of a deed and the Defendant, Ray Hall said in his letter that the warranty deed would be recorded and that the seller, at that time was Ray Hall and Floyd Rigby.

5. The Court finds that the Plaintiff did not take further action until there was notice that a Sheriff's sale would be held on the 11th day of January, 1988 and said Sheriff's sale was for lot #128, Tommy Creek Subdivision.

6. The Court finds that the Plaintiff paid taxes on the property for the years 1981, 198[illegible] 1 '3, 984 and 1985.

7. The Court finds that the P aintiff paid the taxes for the year 1987 and that the attorney for Anna R. Fleischmann paid the taxes for the year 1986.

8. The Court finds that th attorney for Anna R. Fleischmann obtained a judgment against Rimaras Inc., and filed said judgment of record on the 8th day of July, 1985.

9. The Court finds that the property was noticed for Sheriff's sale on January 11, 1988 and that the attorney for Anna R. Fleischmann and the attorney for Plaintiffs attended said sale and the attorney for Plaintiffs put Fleischmanns on notice that the Plaintiffs claimed that they owned all of lot #128 and the cabin situated thereon and Fleischmann was put on notice, through her attorney, prior to the time of the Sheriff's sale.

10. The Court finds that the Sheriff's sale took place and the Sheriff's deed was issued to Fleischmann on July 12, 1988.

11. The Court finds that on November 11, 1987, that Floyd Rigby wrote to Plaintiffs and told him that he would give Mr. Garland a warranty deed from Rimaras, Inc., to Mr. & Mrs. Garland, if Mr. Garland would pay certain amounts requested by Mr. Rigby as set forth in the letter. The Court finds that Mr. Garland refused to pay that amount.

12. The Court finds that the record title is in the name of Mrs. Anna R. Fleischmann, pursuant to a Sheriff's deed and that possession of the property is in the Plaintiffs.

13. The Court finds that Rimaras Inc., is in default and asserts no ownership interest in said property and that Ray Hall, through his attorney, Willard R. Bishop, does not claim an ownership interest in said property.

14. The Court finds that the case of Kartchner v. State Tax Commission, 294 P.2d 790, (Utah 1956) is controlling and that the Defendant, Anna R. Fleischmann purchased whatever interest Rimaras owned in lot #128 at Tommy Creek Subdivision at Sheriff's sale.

15. The Court finds that Rimaras Inc., did not have any ownership interest in the property at the time the Sheriff's sale was made.

16. The Court finds that to hold otherwise would shock the Court and that it would be patently unfair to deliver the real property and the cabin to the Defendant Anna R. Fleischmann.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact the Court concludes that the Plaintiffs are entitled to judgment quieting title to said property in favor of Plaintiffs and against the Defendants Anna R. Fleischmann, Rimaras Inc., and Ray Hall.

DATED this 21st day of October, 1988.

DON V. TIBBS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I do hereby certify that on the 13th day of October, 1988, I mailed a true and correct copy of the foregoing, first class, postage prepaid to Patrick H. Fenton, Attorney at Law, 154 North Main Street, Cedar City, UT 84720 and Willard R. Bishop, BISHOP & RONNOW, P.O. Box 279, Cedar City, UT 84720.

Secretary

MICHAEL W. PARK (2516)
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Telephone: (801) 586-6532

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR

GARFIELD COUNTY, STATE OF UTAH

ROBERT G. GARLAND and MARY GARLAND, Plaintiffs, vs. FLOYD J. RIGBY, RAY HALL, RIMARAS, INC., a Utah Corporation, and ANNA R. FLEISCHMANN, Defendants.	)	JUDGMENT Civil No. 86-431

The above entitled matter came on regularly for hearing on Thursday the 6th day of October, 1988, before the Honorable Don V. Tibbs, District Court Judge and the Plaintiffs were present and represented by their attorney, Michael W. Park and Anna R. Fleischmann was represented by her attorney, Patrick H. Fenton and the Court having heard the testimony of the parties and having reviewed the exhibits and having heard the arguments of counsel,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that title to the following described property located in Garfield County, State of Utah is hereby quieted in favor of Robert G. Garland and Mary Garland and against Rimaras, Inc., a Utah Corporation, Anna R. Fleischmann and Ray Hall. Said property is located in Garfield

County, State of Utah and more particularly described as follows:

All of Lot 128 MAMMOTH CREEK RANCHETTS, TOMMY CREEK UNIT 1, a subdivision, according to the Official Plat thereof, recorded in the office of the County Recorder of said County.

Rimaras, Inc., a Utah Corporation, Ray Hall and Anna R. Fleischmann have no interest in said property.

DATED this 31st day of October, 1988.

DON V. TIBBS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I do hereby certify that on the 13th day of October, 1988, I mailed a true and correct copy of the foregoing, first class, postage prepaid to Patrick H. Fenton, Attorney at Law, 154 North lain Street, Cedar City, UT 84720 and Willard R. Bishop, BISHOP & RONNOW, P.O. Box 279, Cedar City, UT 84720.

Secretary

TO: _____ Cedar City Utah, Oct 31 1980

Name of Broker Company

IN CONSIDERATION OF your agreement to use your efforts to present this offer to the Seller, I/we Robert G. Garland AND Mary Garland hereby deposit with you as earnest money the sum of ($ 7700.-) Seven Thousand Seven Hundred DOLLARS in the form of Trade (Ford Tractor, Trailor, 3/4 Ton Truck) to secure and apply on the purchase of the property situated at: Lot # 126, Tommy Creek Subdivision (See page 2 - 2)

Mammoth Creek City, Iron County, State of Utah including any of the following items if at present attached to the premises: Plumbing and heating fixtures and equipment including stoker and oil tanks, water heaters, and burners, electric light fixtures excluding bulbs, bathroom fixtures, toilet shades, curtain rods and fixtures, venetian blinds, window and door screens, linoleum, all shrubs and trees, and any other fixtures except None

The following personal property shall also be included as part of the property purchased: Together with Certificate No. 41126 from Mammoth Creek Water Association

The total purchase price of ($ 7700.-) Seven Thousand Seven Hundred N/100 DOLLARS shall be payable as follows: $ 7700.- which represents the aforedescribed deposit, receipt of which is hereby acknowledged by you; $ -0- when seller approves sale; $ -0- on delivery of deed or final contract of sale which shall be on or before _____ 19____, and $ -0- each month commencing _____

until the balance of $ -0- together with interest is paid; provided, however, that buyer at his option, at any time, may pay amounts in excess of the monthly payments upon the unpaid balance, subject to the limitations of any mortgage or contract by the buyer herein assumed. Interest at -0- % per annum on the unpaid portions of the purchase price to be included in the prescribed payments and shall begin as of date of possession which shall be on or before 10-31 1980 All risk of loss and destruction of property, and expenses of insurance shall be born by the seller until date of possession at which time property taxes, rents, insurance, interest and other expenses of the property shall be prorated as of date of possession. All other taxes and all assessments, mortgages, chattel liens and other liens, encumbrances or charges against the property of any nature shall be paid by the seller except: None

The following special improvements are included in this sale: Sewer ☐—Connected ☐. Septic Tank and/or Cesspool ☐. Sidewalk ☐. Curb and Gutter ☐ Special Street Paving ☐. Special Street Lighting ☐. Culinary Water (City ☐. Other Community System ☐. Private ☐ (Legend: Yes (x) No (0).

CONTRACT OF SALE OR INSTRUMENT OF CONVEYANCE TO BE MADE ON THE APPROVED FORM OF THE UTAH SECURITIES COMMISSION IN THE NAME OF Robert G. Garland and Mary Garland, his wife

This payment is received and offer is made subject to the written acceptance of the seller endorsed hereon within _____ days from date hereof, and unless so approved the return of the money herein receipted shall cancel this offer without damage to the undersigned agent.

In the event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of the seller be retained as liquidated and agreed damages.

It is understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and that no verbal statement made by anyone relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein. It is further agreed that execution of the final contract shall abrogate this Earnest Money Receipt and Offer to Purchase.

N/A Agent By _____

Broker Company

We do hereby agree to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with abstract brought to date or at Seller's option a policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed or Subdivision Deed; In the event of sale of other than real property, seller will provide evidence of title or right to sell or lease. If either party fails so to do, he agrees to pay all expenses of enforcing this agreement, or of any right arising out of the breach thereof, including a reasonable attorney's fee.

The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay said agent a commission of -0- % of the sale price. In the event seller has entered into a listing contract with any other agent and said contract is presently effective, this paragraph will be of no force or effect.

10/31/80 Date — Seller

10/31/80 Date — Seller

Robert G. Garland — Purchaser

NOTE:

IT SHALL BE FURTHER UNDERSTOOD THAT GARLAND SHALL HAVE THE RIGHT TO AGAIN INSPECT SUBJECT PROPERTY AND SHOULD HE DESIRE, SELECT A DIFFERENT LOT WITHIN TOMMY CREEK SUBDIVISION. HE MAY SELECT FROM LOTS # 41, 126, FOR THE SAME TERMS AND CONDITIONS).

IT IS FURTHER UNDERSTOOD AND AGREED THAT A CABIN PAD SHALL BE CLEARED BY SELLER WHEN GARLAND SO INSTRUCTS.

(State law requires brokers to furnish copies of this contract bearing all signatures to buyer and seller. Dependent upon the method used, one of the following forms must be completed.)

RECEIPT

I acknowledge receipt of a final copy of the foregoing agreement bearing all signatures:

Seller — Date — Purchaser — Date

I personally caused a final copy of the foregoing agreement bearing all signatures to be mailed to the ☐ Seller, ☐ Purchaser, on _____ 19____, by registered mail and return receipt is attached hereto.

Broker _____ By _____

Blank No. 121 Long—Gem Printing Co.

and not when cause is created, 3 A. L. R. 682.

Limitation applicable to action for consequential damage as result of taking or damaging of property for public use, 30 A. L. R. 1190, 139 A. L. R. 1288.

Limitation applicable to action or proceeding by owner for compensation where property is taken in exercise of eminent domain without antecedent condemnation proceeding, 123 A. L. R. 676.

Posting of notice or other steps preliminary to nonjudicial foreclosure of mortgage or deed of trust as suspending statute of limitations, 122 A. L. R. 938.

Statute of limitations applicable to action for encroachment, 24 A. L. R. 2d 903.

When does cause of action accrue, for purposes of statute of limitations, against action based upon encroachment of building or other structure upon land of another, 12 A. L. R. 3d 1265.

When statute of limitations or laches commences to run against action to set aside fraudulent conveyance or transfer in fraud of creditors, 100 A. L. R. 2d 1094.

78-12-7. Adverse possession—Possession presumed in owner.—In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law; and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to such legal title for seven years before the commencement of the action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-7.

Compiler's Notes.

This section is identical to former section 104-2-7 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3. Section 104-2-7 was amended by Laws 1951, ch. 19, § 1; that provision is compiled as 78-12-7.1 herein. The Supreme Court held the amendment was valid despite the repeal of section 104-2-7.

Cross-References.

Marketable record title, 57-9-1 et seq.
Occupying claimants, 57-6-1 et seq.

Applicability of section.

This section does not apply to private rights of way or to any other class of easement by prescription. Harkness v. Woodmansee, 7 U. 227, 26 P. 291.

Admission.

In action to recover possession of certain real property, defended on ground of adverse possession, defendant's application to enter lands as homestead, held direct admission that legal title to lands was in United States. Hanks v. Lee, 57 U. 537, 195 P. 302.

Boundary dispute.

In an action to quiet title where it was proved that fence separating the litigants' properties was off center, but had been maintained on the same line for 58 years, a boundary by acquiescence was created. Provonsha v. Pitman, 6 U. (2d) 26, 305 P. 2d 486.

Cotenants.

Fact that some of tenants in common have been in exclusive possession of the common property for more than seven years is not sufficient to show that their possession has been adverse to other cotenants, since cotenant is entitled to possession of entire property so long as he does not exclude his cotenants or otherwise clearly act adversely to their rights, and, to acquire title by adverse possession, cotenant must in some way indicate to his cotenants that he is claiming the property adversely to them. Sperry v. Tolley, 114 U. 303, 199 P. 2d 542.

Fact that some of tenants in common contracted to purchase tax titles to the common property in their own names was insufficient to put other cotenants on notice of adverse claims by such tenants in common, since other cotenants had right to believe that tax titles were being purchased for their benefit and not in opposition to them. Sperry v. Tolley, 114 U. 303, 199 P. 2d 542.

Repairs and improvements made by cotenants in possession to dwellings, buildings and fences were insufficient to put other cotenants on notice that cotenants in possession were claiming title adversely to them, since such acts were normally consistent with tenancy in common and not adverse to it. Sperry v. Tolley, 114 U. 303, 199 P. 2d 542.

While "for sale" advertisement as to part of common property by cotenants in possession was sufficient to put other cotenants on notice of adverse claim, sufficient time had not elapsed therefrom to

when it was suitable only for placer mining, where another subsequently and surreptitiously located and filed placer claim covering land. Springer v. Southern Pac. Co., 67 U. 590, 248 P. 819.

Defendants failed to establish occupation or possession of certain land within limits of requirements of this section, where only evidence of possession consisted of use by defendants of that land for grazing of their cattle, which use was not exclusive inasmuch as third person used the land for same purpose to knowledge of defendants without intervention or complaint on their part. Jenkins v. Morgan, 113 U. 534, 196 P. 2d 871.

Repairs and improvements made by cotenants in possession to dwellings, buildings and fences were insufficient to put other cotenants on notice that cotenants in possession were claiming title adversely to them, since such acts were normally consistent with tenancy in common and not adverse to it. Sperry v. Tolley, 114 U. 303, 199 P. 2d 542.

Maintenance of a fence, payment of taxes, and other evidence of possession and occupation for over twenty years were sufficient to establish ownership as against city's claim. Gibbons v. Salt Lake City Corp., 6 U. (2d) 219, 310 P. 2d 513.

Collateral References.

Adverse Possession⇐19-21.
2 C.J.S. Adverse Possession § 30 et seq.
3 Am. Jur. 2d 97 et seq., Adverse Possession § 19 et seq.

Acquisition by user or prescription of right of way over uninclosed land, 46 A. L. R. 2d 1140.

Adverse possession based on encroachment of building or other structure, 2 A. L. R. 3d 1005.

Adverse possession involving ignorance or mistake as to boundaries—modern views, 80 A. L. R. 2d 1171.

Adverse possession of common, 9 A. L. R. 1373.

Adverse possession of railroad right of way, 50 A. L. R. 303.

Cutting of timber as adverse possession, 170 A. L. R. 887.

Grazing of livestock or gathering of natural crop as fulfilling traditional elements of adverse possession, 48 A. L. R. 3d 818.

Possession by widow after extinguishment of dower as adverse to heirs or their privies, 75 A. L. R. 147.

Reputation as to ownership or claim as admissible on question of adverse possession, 40 A. L. R. 2d 770.

Use by public as affecting acquisition by individual of right of way by prescription, 111 A. L. R. 221.

Use of property by public as affecting acquisition of title by adverse possession, 56 A. L. R. 3d 1182.

78-12-12. Possession must be continuous, and taxes paid.—In no case shall adverse possession be considered established under the provisions of any section of this code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-12.

Compiler's Notes.

This section is identical to former section 104-2-12 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3. Section 104-2-12 was amended by Laws 1951, ch. 19, § 1; that provision is compiled as 78-12-12.1 herein. The Supreme Court held the amendment was valid despite the repeal of section 104-2-12.

Cross-References.

Marketable record title, 57-9-1 et seq.
Occupying claimants, 57-6-1 et seq.
Tax sales, 59-10-29 et seq.

Acquisition of title in general.

Where claimant under claim of ownership went into actual possession of certain lots which had been sold to county for unpaid taxes, and immediately thereafter fenced lots and commenced to improve them, subsequently receiving deed from county, held possession was adverse, from time of entry, as to all the world except county. Welner v. Stearns, 40 U. 185, 120 P. 490, Ann. Cas. 1914C, 1175.

Open, notorious and hostile use and possession of the property and payment of taxes thereon, all under claim of right, will constitute adverse possession. Mansfield v. Neff, 43 U. 258, 134 P. 1160.

Where defendant and his predecessors had been in actual, open, and adverse possession of land for statutory period, and for seven successive years had paid taxes thereon, and they were inclosed, occupied, and cultivated, title was ac-

CERTIFICATE OF SERVICE

I hereby certify that I mailed four copies of the foregoing Petition for Writ of Certiorari, to Michael W. Park, Esq., of THE PARK FIRM, Attorneys for Plaintiffs-Respondents, at 110 North Main, Suite H, P. O. Box 765, Cedar City, UT 84721-0765, this 5 day of DECEMBER, 1989.

PATRICK H. FENTON
Attorney for Defendant-Appellant
Anna R. Fleischmann